Filed 4/10/09 P. v. Driskill CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TERESA FAY DRISKILL, Defendant and Appellant.	G039847 (Super. Ct. No. 07HF1427) O P I N I O N
In re TERESA FAY DRISKILL, on Habeas Corpus.	G040913

Appeal from a judgment of the Superior Court of Orange County, Everett W. Dickey, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed. Original proceedings; petition for writ of habeas corpus after judgment of the Superior Court of Orange County. Petition denied.

Kazoua Cha, under appointment by the Court of Appeal, for Defendant, Appellant and Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia, Marilyn L. George and Elizabeth S. Voorhies, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Teresa Fay Driskill appeals from a judgment entered after a jury found her guilty of felony possession of methamphetamine. She argues the trial court erred by instructing the jury on consciousness of guilt through a modified version of CALCRIM No. 371. Defendant further contends her trial counsel was ineffective for requesting that the trial court instruct the jury with the portion of CALCRIM No. 371 addressing how suppression of evidence by a third party might be indicative of defendant's consciousness of guilt.

In her petition for a writ of habeas corpus, defendant reiterates her argument that her trial counsel was ineffective for requesting that a portion of CALCRIM No. 371 be given to the jury. She also argues her trial counsel provided ineffective assistance of counsel because he (1) advised her to stipulate that she knew the substance found in her purse was methamphetamine, and (2) failed to object to the admission of evidence that she had lied to an officer about her name and birth date because she feared there was an outstanding warrant for her arrest.

We affirm and deny defendant's petition. Substantial evidence supported the modified version of CALCRIM No. 371 given to the jury. We further conclude defendant's trial counsel's representation of defendant was not deficient. First, after the trial court stated it would give one portion of CALCRIM No. 371, defendant's counsel

requested the court also instruct with a second portion of CALCRIM No. 371; that portion was requested to inform the jury it could not attribute the suppression of evidence by a third party to defendant as reflecting a consciousness of guilt on defendant's part unless she was present and knew about it at the time or, if not present, authorized the other person's actions. Second, defendant's counsel advised defendant to stipulate that she knew the substance found in her purse to be methamphetamine, to avoid the admission of evidence of defendant's prior conviction for possession of methamphetamine. Finally, the record before us, which includes the declaration of defendant's trial counsel filed in support of the petition for a writ of habeas corpus, shows counsel objected to the admission of evidence defendant lied to the officer, but his objection was overruled.

BACKGROUND

On April 16, 2007 at 10:00 p.m., Deputy Eduardo Antonio Macias of the Orange County Sheriff's Department was on duty when he was dispatched to respond to a domestic violence call made from a residence in Trabuco Canyon. When Macias was about eight houses away from the residence, he was flagged down by defendant; she was standing in front of the residence of Colleen Mullens and her husband. Macias stopped his car, and asked defendant, "did you call us?" Defendant said, "yes."

Macias asked defendant what had happened and she told him she was injured in a domestic violence incident at her residence, involving her live-in boyfriend, George Kent. Macias asked defendant if she was injured and she said, "no." Macias noticed, however, an abrasion on her right elbow and asked her about it. Defendant said that the abrasion was one of the injuries she suffered. Macias questioned defendant about what had happened and why she and Kent had been fighting. Defendant became evasive; she told Macias she did not want Kent arrested, and she did not need Macias's help anymore.

Macias asked defendant for her full name and date of birth. She told him her first name was Teresa but provided an incorrect spelling, and told him her last name was Dricoll instead of Driskill. She also told Macias her birth date is October 23, 1960. Her actual birth date is February 23, 1960.

Defendant appeared to Macias as if she did not want to communicate with him anymore. He then explained to her that he was there to help her. He reminded her that she had called the officers, told her the officers take domestic violence calls very seriously, and said he was there to help. He told her he needed to speak with Kent. Defendant drove her car to her residence; Macias followed in his patrol car. A second officer, identified in the record as Deputy Elmore, arrived on the scene.

After Macias arrived at defendant's residence, he spoke with Kent, who appeared to be intoxicated; Elmore stayed with defendant. Kent told Macias that he and defendant had argued. Kent admitted he had dragged defendant across the floor of the living room of their residence and out the door. He told Macias he closed and locked the door behind defendant. Kent also told Macias defendant "probably had some methamphetamine on her."

Macias went back outside where defendant was standing by her car and asked defendant for identification. She said she did not have any identification with her. She told Macias her identification was in her purse which she had left at the Mullenses' residence. Macias asked defendant if they could retrieve her purse, and defendant said, "yes." Macias offered to give defendant a ride back to the Mullenses' residence, and defendant said, "yes." Defendant took a couple of steps, said that her back was really bothering her, and suddenly fell to the ground. The officers tried to assist her, and asked her if she was okay; she said her sciatic nerve was acting up. The officers called the paramedics at defendant's request.

Macias asked defendant if he could retrieve her purse, and defendant said, "yes." Macias drove to the Mullenses' residence and knocked on the front door. Colleen

Mullens answered. Macias told her that defendant asked him to pick up her purse. Macias testified Colleen Mullens "stepped back and she looked to whoever was sitting there and said something to the effect of, 'honey, Fay's purse isn't here, is it,' [while] shaking her head from side to side." Macias heard a male voice say, "no." Macias thought Colleen Mullens's behavior was "odd," and he told her that he "was an adult and [he] could see what she was doing."

Macias asked Colleen Mullens about the purse and she said that defendant might have hidden it in the garage. She escorted Macias to the garage and they spent a couple of minutes unsuccessfully looking for the purse. Next, Colleen Mullens led Macias to look for the purse in a truck parked in the driveway; it was not there.

Colleen Mullens and Macias then walked back to her front porch and she stepped inside the house. Macias told her that she was interfering with his investigation. In response to Macias's statement, Colleen Mullens suddenly picked up a screwdriver from the floor, and, just inside the front door, pulled back the carpet, and removed some screws out of the floorboard. She quickly pulled up the floorboard, reached into a crevice area, and retrieved a purse which she handed to Macias. The purse was tan in color; it was not dirty and did not otherwise appear to Macias as though it had been left in the crevice area under the floorboard for a long period of time. After Macias asked Colleen Mullens if he could search the crevice area, she told Macias to leave and closed the door on him.

Macias drove back to defendant's residence with the purse and found defendant being treated by paramedics on the front lawn of her residence. Macias showed defendant the purse and asked her if it was hers. She responded, "[y]es." He asked if he could search her purse for identification and drugs. She said, "[y]es."

While searching defendant's purse, Macias found her driver's license which showed her true name and birth date. He also found a paper bindle he suspected contained a controlled substance. He showed it to defendant and asked, "what's this?"

Defendant responded, "it's not mine." He opened the bindle and found a substance that was later identified to contain about one gram of methamphetamine.

Defendant was charged in an information with one count of felony possession of a controlled substance (methamphetamine) in violation of Health and Safety Code section 11377, subdivision (a).

The jury found defendant guilty as charged. The trial court suspended imposition of sentence and placed defendant on three years' informal probation. Defendant appealed. After filing the opening brief, defendant filed a petition for writ of habeas corpus in this court, which proceeding was consolidated with defendant's direct appeal.

DISCUSSION

I.

THE TRIAL COURT DID NOT ERR BY INSTRUCTING THE JURY WITH CERTAIN PORTIONS OF CALCRIM NO. 371 BECAUSE THEY WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Defendant contends the trial court erred by instructing the jury on suppression of evidence indicating consciousness of guilt because the given instruction was not supported by substantial evidence.

"It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference. [Citation.] Whether or not any given set of facts may constitute suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of a defendant is a question of law. Thus in order for a jury to be instructed that it can infer a consciousness of guilt from suppression of adverse evidence by a defendant, there must be some evidence in the record which, if believed by the jury, will sufficiently support the suggested inference.

Furthermore, the determination of whether there is such evidence in the record is a matter which must be resolved *by the trial court before* such an instruction can be given to a jury." (*People v. Hannon* (1977) 19 Cal.3d 588, 597-598.)

Here, the trial court instructed the jury with a modified version of CALCRIM No. 371 regarding the suppression of evidence by defendant or by a third party on behalf of defendant as indicating consciousness of guilt, as follows: "If the defendant tried to hide evidence, that conduct may show that (she) was aware of (her) guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself. [¶] If someone other than the defendant tried to conceal evidence, that conduct may show the defendant was aware of (her) guilt, but only if the defendant was present and knew about that conduct, or, if not present, authorized the other person's actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself."

Substantial evidence supported the trial court's instruction. First, substantial evidence supported the inference defendant had attempted to conceal her purse from the officers. Defendant was at the Mullenses' residence at the time Macias arrived—the location where her purse was ultimately found. She drove her car back to her residence after Macias told her he needed to speak with Kent. The record does not show she did anything to obtain her purse before returning to her residence. After defendant was asked to produce identification and told Macias that her purse was at the Mullenses' residence, Macias asked defendant if they could go and retrieve the purse. Although defendant agreed, once she and Macias moved to return to the Mullenses' residence, she suddenly collapsed to the ground, complaining of severe pain. The evidence was therefore sufficient to show that defendant had hidden her purse at the Mullenses' residence, and thus supported the trial court's decision to give the first portion of CALCRIM No. 371.

Second, substantial evidence supported a finding Colleen Mullens, with defendant's authorization, concealed defendant's purse. As discussed *ante*, defendant was at the Mullenses' residence at the time Macias arrived and she knew her purse was at their residence. When Macias asked Colleen Mullens for defendant's purse, she acted in an odd manner, feigning to ask an unseen person inside the residence whether defendant had left her purse, while shaking her head apparently in an effort to signal that person to answer, "no." She thereafter led Macias on a wild goose chase looking in the garage and in a truck for the purse. But once Macias accused Colleen Mullens of interfering with his investigation, the evidence shows she stopped covering for defendant. Instead, at that point, she reached for a nearby screwdriver, pulled back the carpet, removed some screws, quickly pulled up the floorboard, and pulled out defendant's purse from a crevice area under the floorboard. Thus, the evidence shows Colleen Mullens not only knew where defendant's purse was, but also, considering her speed and dexterity in retrieving it from the crevice area under the floorboard, she herself had hidden it for defendant.

Defendant contends, "[d]espite finding on the record that there was no evidence to support giving such an instruction [CALCRIM No. 371], the trial court also gave the instruction on third person authorized by a defendant to suppress evidence as consciousness of guilt, at the request of trial counsel." The trial court initially intended to instruct the jury only on the portion of CALCRIM No. 371 regarding defendant's suppression of evidence as indicating consciousness of guilt. After argument, however, the court concluded that it also would instruct the jury on suppression of evidence by a third party on behalf of defendant as indicating consciousness of guilt. The trial court was free to change its mind about the state of the evidence and apparently did. The record does not show that the court continued to believe this portion of the instruction was without evidentiary support, but gave it to the jury anyway. As discussed *ante*, substantial evidence supported giving that portion of the instruction.

We find no error.

II.

THE RECORD DOES NOT SHOW DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

Defendant contends in her petition for a writ of habeas corpus that her trial counsel was ineffective because he (1) requested that the court instruct the jury on third party suppression of evidence on behalf of defendant to show defendant's consciousness of guilt;[1] (2) advised defendant to stipulate to her knowledge of the substance at issue as methamphetamine; and (3) failed to object to evidence that defendant lied to Macias about her name and birth date because she thought there was an outstanding warrant for her arrest. We review each of defendant's contentions of ineffective assistance of counsel, in turn.

"'"In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.' [Citations.] Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a 'reasonable probability that, but for counsel's unprofessional errors, the result of the

[1] Defendant made this argument in her opening brief as well.

proceeding would have been different.' [Citation.]"'" (*People v. Salcido* (2008) 44 Cal.4th 93, 170.)

A.

Defendant's Trial Counsel Was Not Deficient in Requesting the Court to Instruct the Jury on Third Party Suppression of Evidence on Behalf of Defendant as Indicative of Defendant's Consciousness of Guilt.

Defendant contends her trial counsel provided ineffective assistance by requesting that the court instruct the jury with the portion of CALCRIM No. 371 addressing the occasion of a third party suppressing evidence on behalf of a defendant as indicative of the defendant's consciousness of guilt (referred to as alternative C in the CALCRIM No. 371 pattern instruction).[2] Defendant argues her trial counsel "did not provide a reasonable tactical reason for this decision nor did he explain why he felt this instruction would assist him in his defense of [defendant]'s case."

---

[2] CALCRIM No. 371 states in full: "<*Alternative A—suppression*> [¶] [If the defendant tried to hide evidence or discourage someone from testifying against (him/her), that conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself.] [¶] <*Alternative B—fabrication*> [¶] [If the defendant tried to create false evidence or obtain false testimony, that conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself.] [¶] <*Alternative C—fabrication or suppression by a third party*> [¶] [If someone other than the defendant tried to create false evidence, provide false testimony, or conceal or destroy evidence, that conduct may show the defendant was aware of (his/her) guilt, but only if the defendant was present and knew about that conduct, or, if not present, authorized the other person's actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself.] [¶] <*Give final paragraph if multiple defendants on trial*> [¶] [If you conclude that a defendant (tried to hide evidence[,]/ discouraged someone from testifying[,]/ [or] authorized another person to (hide evidence/ [or] discourage a witness)), you may consider that conduct only against that defendant. You may not consider that conduct in deciding whether any other defendant is guilty or not guilty.]"

Defendant's trial counsel's request that the trial court instruct the jury with alternative C of CALCRIM No. 371 arose out of the following discussion:

"[Defendant's counsel]: . . . [I]f we can take a look at [CALCRIM No.] 371 because I know 371 has three parts to it.

"The Court: What part did the People want on that, [prosecutor]?

"[The prosecutor]: Well, obviously alternative A, not B. And then alternative C applies as well.

"[Defendant's counsel]: Alternative C is only if the defendant was present and knew about the conduct. If not present[,] authorized the other person'[s] actions. Do we have any evidence that she was present or authorized the action?

"The Court: What part of A are you thinking is applicable, [prosecutor]?

"[The prosecutor]: Well[,] I mean the testimony regarding where the purse was found. I mean obviously the argument is that the defendant—

"The Court: Under the floorboard?

"[The prosecutor]: That's right.

"[Defendant's counsel]: But is there any evidence that the defendant hid it under the floorboard? Because it starts off did the defendant try to hide the evidence or discouraged someone from testifying. Is there evidence that she hid it or discouraged anyone from coming to testify?

"[The prosecutor]: I don't think there's evidence that she discouraged anyone from coming to testify, but I think there's evidence of—that either she at her own—through her own actions or with the help of her friends hid this evidence.

"[Defendant's counsel]: If you're arguing that, then obviously A does not apply.

"The Court: I think I'll give the A part, the first part of it about hiding evidence, but none of the rest of it. And the reason I say that is because women's purses are a peculiar item that women usually don't let get too far away from their body. They

are something that most women either carry with them or know where they are close by because they contain important documents. It's like a man's wallet. So I think that it can be argued that there would be absolutely no reason for somebody else to have her purse and be hiding it under a floorboard. It's extremely unlikely that that scenario would exist. So the most common sense interpretation would be that the defendant is responsible for putting it there. If she didn't do it herself, having somebody else do it. That's the way I look at it. At least it's an argument that the People can make and there's enough evidence that that's what happened because of the nature of that particular item that I think the instruction should be given. Again it's an instruction which is really helpful to the defendant because it tells the jury that that's not enough to prove guilt by itself, even if they conclude that she hid the purse.

"[Defendant's counsel]: And so that would be A and C then; correct?

"The Court: No, just A. Yeah. C, there's no evidence of C at all.

"[Defendant's counsel]: There may be because it looks like Miss Mull[ens] knew exactly where it was and so it could be that she knew where it was because she put it there and so it could be—

"The Court: Do you want C?

"[Defendant's counsel]: Let me take a look at the rest of it. I've only read the first two lines so far.

"[The prosecutor]: I think C does apply because either the defendant put the purse in the floor[board] or she asked her friend to put it there for her. I mean . . . my theory is that one of those things happened. Either she put it there herself or asked her friend to put it there and her friend knew where it was.

"The Court: So you're suggesting that C be given with the language only relating to concealing evidence?

"[The prosecutor]: Right. I don't think creating false evidence, providing false testimony will apply. But I think if someone other than the defendant tried to

conceal or destroy evidence, that conduct may show the defendant was aware of her guilt but only if the defendant was present and knew about the conduct or if not present[,] authorized the other person's actions.

"[Defendant's counsel]: I'd like to keep that in because it looks like with that—

"The Court: I'm sorry. What?

"[Defendant's counsel]: I'd like to keep that in—

"The Court: On C?

"[Defendant's counsel]: Yes. *Because it looks like they would have to prove a little bit more up than that.*

"The Court: I'm sorry. I still don't understand. I thought you wanted alternative C as well as A if I give A.

"[Defendant's counsel]: I don't mind alternative C being in because it looks like the People are going with two different theories, that it could be defendant hid it herself or she had Miss Mull[ens] hide it. So that would be—

"The Court: All right. I'll give both [of] them." (Italics added.)

Defendant's petition for a writ of habeas corpus includes the declaration of her trial counsel, in which he explained his strategy with regard to CALCRIM No. 371, as follows: "During discussions on jury instructions, I objected to the use of CALCRIM [No.] 371, suppression of evidence by [defendant] to show consciousness of guilt. The court ruled that Alternative A of the instruction would be submitted to the jury. I therefore requested Alternative C be submitted also. I believed there was enough evidence for the prosecutor to argue that another person other than the [defendant] concealed the evidence. Alternative C of CALCRIM [No.] 371 requires the prosecutor to also prove the [defendant] was present and knew about that conduct, or, if not present, authorized the other person's actions."

Defendant's trial counsel was faced with a situation in which the trial court, over counsel's objection, concluded it would instruct the jury on alternative A of CALCRIM No. 371 pertaining to defendant's suppression of evidence as indicative of her consciousness of guilt. In light of the evidence showing Colleen Mullens had a role in concealing defendant's purse from Macias, defendant's trial counsel made the tactical decision of requesting alternative C of CALCRIM No. 371, which instructed the jury not to impute a consciousness of guilt to defendant based on Colleen Mullens's conduct unless the jury found defendant had been "present and knew about that conduct, or, if not present, authorized the other person's actions."

In *People v. Bell* (2004) 118 Cal.App.4th 249, 256, the appellate court observed how instructions on consciousness of guilt can benefit the defense. The court noted how such instructions "'ma[k]e clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, *while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt*, and allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory.'" (*Ibid.*) Here, the portion of CALCRIM No. 371 requested by defendant's trial counsel contained the same admonishments.

Based on these reasons, we cannot conclude that defendant's trial counsel provided ineffective assistance.

B.

Defendant's Trial Counsel Was Not Ineffective by Advising Defendant to Stipulate She Knew the Substance Found in Her Purse Was Methamphetamine.

Defendant contends her trial counsel "failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates when he advised

[defendant] to stipulate to her knowledge of the narcotic nature of the substance at issue in trial, thereby undermining her defense that she did not possess or know of the substance in her purse."

The jury was instructed, pursuant to CALCRIM No. 2304, that, in order to find defendant guilty of possession of methamphetamine, the prosecution must prove that "1. The defendant unlawfully possessed a controlled substance; [¶] 2. The defendant knew of its presence; [¶] 3. The defendant knew of the substance's nature or character as a controlled substance; [¶] 4. The controlled substance was methamphetamine; [¶] AND [¶] 5. The controlled substance was in a usable amount."

Before trial, the prosecution filed a motion in limine seeking the admission of evidence of defendant's prior conviction for possession of methamphetamine, under Evidence Code section 1101, subdivision (b). At a pretrial hearing, defendant's counsel informed the court that defendant decided to stipulate to "knowledge of the nature of the substance, but not stipulate to knowledge of its presence," and sought confirmation that "with that stipulation, knowledge of the nature of the substance, [no one] would . . . be introducing any sort of priors at all or make mention of the prior at all." Defendant's counsel and the prosecutor agreed to work out the language of the stipulation "at a later point."

At the close of evidence at trial, the court informed the jury of the stipulation, as follows: "Ladies and gentlemen, I'm going to read to you at this time a stipulation between the attorneys. That's an agreement as to certain facts. When the attorneys stipulate, you can accept those facts as having been proven without any other evidence to prove those facts. The stipulation reads as follows: 'The defendant . . . knew of the substance's nature or character as a controlled substance, methamphetamine.'"

Defendant's trial counsel explained in his declaration, filed in support of defendant's petition for a writ of habeas corpus, that he "advised [defendant] to stipulate that she knew what methamphetamine was. My defense, on [defendant]'s behalf, was

that she did not know the methamphetamine at issue was in her purse and that someone else planted the methamphetamine in her purse without her knowledge. [¶] . . . To avoid admission of [defendant]'s prior contact for possession of methamphetamine, I advised [defendant] to stipulate to knowledge, a necessary element to the charged offense. My rationale for the stipulation was that [defendant] knew what methamphetamine was and that it was a controlled substance. . . . I agreed to the language of the stipulation as written since it resembled the language of element number 3 of jury instruction CALCRIM [No.] 2304."

Defendant argues the record shows "trial counsel merely stipulated to element three of CALCRIM No. 2304 without a clear understanding that there is a distinction between the requirement that the prosecution needs to prove [defendant] knew the substance in question in the case at trial is a narcotic (which is what element three of CALCRIM No. 2304 requires) and the stipulation to the knowledge of the narcotic effects of methamphetamine. . . . A primary defense to [defendant]'s case was that [defendant] did not know there was methamphetamine in her purse. This defense was grossly undermined by the stipulation that she knew the substance in her purse was methamphetamine."

The stipulation tracked the third and fourth elements of CALCRIM No. 2304, namely, defendant knew of the subject substance's nature as the controlled substance of methamphetamine. Defendant's trial counsel's advice that defendant stipulate to these two elements of the charged offense was made to obtain the tactical advantage of precluding the admission of evidence at trial of defendant's prior conviction for possession of methamphetamine.

Defendant contends that, through the wording of the stipulation, she unwittingly also admitted she knew of the presence of the methamphetamine in her purse. Not so. While defendant stipulated she knew the substance that was found in her purse

was the controlled substance of methamphetamine, she did not also stipulate she *knew* the substance was *in her purse* at the time it was found by Macias.

People v. Washington (1979) 95 Cal.App.3d 488, relied upon by defendant, is inapposite. In that case, the appellate court held the trial court erred by rejecting the defendant's stipulation that he was familiar with heroin, the way it is packaged and the way it is sold, on the ground the defendant refused to also stipulate he knew the yellow balloon at issue in the case contained heroin. (*Id.* at pp. 490, 492.) The facts underlying the defendant's conviction for selling heroin are not included in the appellate court's opinion. The appellate court reasoned: "We are of the opinion that *People* [*v.*] *Perez* [(1974) 42 Cal.App.3d 760] was analyzed incorrectly. The obvious intended meaning of that case was that the defendant may 'admit his knowledge of the narcotic nature of the [*type* of] object involved in the primary prosecution.' The accused's admission that he somehow had knowledge of the narcotic nature of the *precise object or substance*, the possession or sale of which he has denied, would ordinarily be tantamount to his confession of guilt, a result clearly unintended by the rule we have discussed." (*Id.* at p. 492, third brackets in original.)

Here, the trial court accepted defendant's stipulation so the issue presented in *People v. Washington*, *supra*, 95 Cal.App.3d 488 is not an issue in this case. Furthermore, that defendant's admission she knew the substance found in her purse was methamphetamine was not tantamount to a confession of guilt on this record. We do not construe the stipulation to admit defendant knew she had methamphetamine in her purse at the time it was found. The record shows defendant's purse had been at the Mullenses' residence and out of defendant's control, at least from the time Macias was flagged down by defendant. When Macias pulled out the paper bindle containing the methamphetamine from defendant's purse, defendant stated, "it's not mine."

We find no error.

C.

The Record Shows Defendant Objected to the Admission of Evidence She Lied About Her Name and Birth Date to Macias.

Defendant contends, in her petition for a writ of habeas corpus, that her trial counsel was ineffective because "he failed to object to evidence admitted that [she] lied about her name and birth date, because she thought she had an outstanding warrant." In defendant's trial counsel's declaration, submitted in support of the petition, he stated: "I objected to the admission of evidence that [defendant] lied about her name and date of birth because she feared she may have an outstanding warrant for her arrest. This objection was made pretrial in the Judge's Chamber and not made on the record. The court ruled that the evidence was admissible, therefore, I did not object to the admission of the evidence of the false statement during trial. I did object to the jury instruction CALCRIM [No.] 362 on evidence [defendant] lied to show consciousness of guilt after close of evidence and during discussions on jury instructions." The record shows the trial court sustained that objection, and did not instruct the jury with CALCRIM No. 362.

Defendant's trial counsel's declaration, which is part of the record before us, constitutes evidence that he did object to the admission of the challenged evidence, albeit not on the record. This evidence of counsel's objection is undisputed. Defendant has therefore failed to carry her burden of showing her trial counsel was deficient for failing to so object.

DISPOSITION

The judgment is affirmed. The petition for a writ of habeas corpus is denied.

FYBEL, J.

WE CONCUR:

O'LEARY, ACTING P. J.

MOORE, J.